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No. 40

In the Supreme Court of the United States

OCTOBER TERM, 1985

THE UNITED STATES OF AMERICA, PETITIONER

v.

GUS L. CONSTANTINE, ALIAS DR. GUS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 22) is reported in 75 F. (2d) 928.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 15, 1935 (R. 25), and a petition for rehearing denied April 2, 1935 (R. 27). The petition for a writ of certiorari was filed May 2, 1935, and was granted June 3, 1935 (R. 27). The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Rule XI of the Rules of Practice and Procedure With Respect to Proceedings in Criminal Cases after Verdict or Finding of Guilt, promulgated by this Court May 7, 1934, and effective September 1, 1934, the finding of guilt having been rendered December 3, 1934 (R. 14–15).

QUESTION PRESENTED

Whether Section 701 of the Revenue Act of 1926, *infra*, imposing a special excise tax of $1,000 on persons carrying on the business of a brewer, distiller, wholesale or retail liquor dealer, wholesale or retail dealer in malt liquor, or manufacturer of stills, in any place where such business is prohibited by the law thereof, became invalid with the repeal of the Eighteenth Amendment, where the business was carried on contrary to a State law or the local or municipal law of a place within a State.

STATUTE INVOLVED

Section 701 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 95 (U. S. C. A., Title 26, Sections 206, 192), provides as follows:

> On and after July 1, 1926, there shall be levied, collected, and paid annually, in lieu of the tax imposed by section 701 of the Revenue Act of 1924, a special excise tax of $1,000, in the case of every person carrying

on the business of a brewer, distiller, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquor, retail dealer in malt liquor, or manufacturer of stills, as defined in section 3244 as amended and section 3247 of the Revised Statutes, in any State, Territory, or District of the United States contrary to the laws of such State, Territory, or District, or in any place therein in which carrying on such business is prohibited by local or municipal law. The payment of the tax imposed by this section shall not be held to exempt any person from any penalty or punishment provided for by the laws of any State, Territory, or District for carrying on such business in such State, Territory, or District, or in any manner to authorize the commencement or continuance of such business contrary to the laws of such State, Territory, or District, or in places prohibited by local or municipal law.

Any person who carries on any business or occupation for which a special tax is imposed by this section, without having paid such special tax, shall, besides being liable for the payment of such special tax, be subject to a penalty of not more than $1,000 or to imprisonment for not more than one year, or both.[1]

[1] By the Revenue Act of 1935, approved August 30, 1935 (Pub., No. 407, 74th Cong.), it was provided in Section 403 that "The special excise tax imposed by section 701 of the Revenue Act of 1926 (U. S. C., Title 26, Section 206) shall not apply with respect to carrying on business after June

The above section is included in Title VII of the Revenue Act of 1926 under the heading "Special Taxes." Pertinent administrative statutory provisions relating to special taxes are printed in the Appendix, *infra*, pp. 50–52. Reference is also made in the Appendix (*infra*, pp. 52–54) to other special taxes imposed upon brewers, ~~distillers~~, etc.

STATEMENT

On November 21, 1934, the United States Attorney for the Northern District of Alabama filed an information in the District Court of the United States for that district charging that the respondent, on October 8, 1934, at Birmingham, Alabama, carried on the business of a retail dealer in malt liquor, which business was contrary to the laws of the State of Alabama, without having paid the special excise tax of $1,000 as required by Section 701 of the Revenue Act of 1926 (R. 1).

30, 1935." Unless the section fell with the repeal of the Eighteenth Amendment, the repeal thereof by the Revenue Act of 1935 did not operate to extinguish either the liability of the respondent for the tax or the penalty incurred by him for failure to pay, it having been alleged in the information that the respondent carried on the business of a retail dealer in malt liquors contrary to State law on October 8, 1934 (R. 1), and Section 13 of the Revised Statutes (U. S. C., Title 1, Section 29) providing that "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." See *United States* v. *Chambers*, 291 U. S. 217.

A demurrer and a motion to quash the information were filed by the respondent, the principal grounds of which were the alleged invalidity of Section 701 (R. 2, 6). The demurrer and the motion to quash were overruled (R. 5, 6). The respondent then pleaded not guilty and waived a jury trial (R. 7).

A stipulation of facts was signed by attorneys for the respondent and the United States Attorney and filed (R. 7–9). The court thereupon found the facts to be those contained in the first paragraph of the stipulation. The remaining facts recited in the stipulation were found to be true but were rejected by the court as irrelevant to the issues presented (R. 14).

The stipulated facts as found by the court were as follows (R. 7–8):

For the fiscal year July 1, 1934, to June 30, 1935, the respondent registered with the Collector of Internal Revenue as a retail liquor dealer and paid the $25 tax imposed upon retail liquor dealers by Revised Statutes, Section 3244, as amended (*infra*, p. 53). On the date stated in the information (October 8, 1934) the respondent was carrying on at his restaurant in the City of Birmingham, Alabama, the business of a retail liquor dealer in malt liquors containing more than one-half of one percent alcohol. The carrying on of such a business was contrary to the laws of the State of Alabama and the City of Birmingham. The respondent had not at any time, however, paid the $1,000

special excise tax prescribed by Section 701 of the Revenue Act of 1926.

The stipulated facts rejected by the court as irrelevant were as follows (R. 8–9):

Prior to the fiscal year the respondent received from the Collector of Internal Revenue a circular which showed the taxes due by retail liquor dealers and retail malt liquor dealers for the fiscal year, but did not refer to the special excise tax of $1,000. Although the respondent stated that he was told that he was required to pay no other tax than that shown in this circular, this was denied by the Collector and his agent. The Collector did not have in his possession the $1,000 liquor stamp covering the tax prescribed by Section 701 until about November 27, 1934, and no such stamps were shown to be in existence in any catalogue of stamps issued by the United States prior to September 13, 1934. No demand was made by the Collector of Internal Revenue for the District of Alabama upon the respondent for the payment of the $1,000 levy until about October 1, 1934.

On July 30, 1926, about a month after Section 701 became effective, the Commissioner of Internal Revenue, with the approval of the Acting Secretary of the Treasury, issued Treasury Department Regulation 3911 (R. 10–11), which listed the $20 tax imposed on all retail dealers in malt liquors by Section 3244 of the Revised Statutes (*infra*, p. 53) as a tax but referred to the $1,000 special tax im-

posed by Section 701 on any person carrying on the retail business of dealer in malt liquors contrary to the laws of any State or Territory as a penalty and therefore collectible only by action in court and not in the summary manner permitted in the case of taxes. On September 13, 1934, however, the Commissioner of Internal Revenue issued new instructions to the Collector of Internal Revenue for the District of Alabama, which advised him that the levy was a true tax and not a penalty. These instructions read, in part, as follows (R. 11):

> Prior to the receipt of the $1,000 special excise tax stamps, collectors of internal revenue may accept payment of the tax and issue the stamps at a later date. While section 3183 of the Revised Statutes prohibits the issuance of a receipt in lieu of a stamp, Treasury Decision No. 2341 holds in effect that a taxpayer is entitled to some evidence of payment when he presents a remittance to an internal-revenue officer in satisfaction of a special tax and it is not possible to issue the special tax stamp immediately. It will, therefore, be permissible for collectors to issue receipts on form 1, which receipts will be construed as merely evidence of payment and will not be in lieu of the $1,000 special excise tax stamp.[2]

On motions for judgment made on behalf of each party the motion of the United States was granted (R. 14–15), and the court found as a conclusion of

[2] We are advised that these instructions were issued September 10, 1934, and were contained in Mimeograph 4236.

law that the respondent had violated Section 701 and "That the said section provided for a tax and not a penalty, and that the tax so provided, was a valid tax" (R. 14). The respondent was accordingly sentenced to pay a fine of $250 (R. 16–17). No opinion was rendered by the District Court.

On an appeal by the respondent the Circuit Court of Appeals for the Fifth Circuit reversed the judgment of conviction, holding that Section 701 imposed not a tax but "a penalty as part of the enforcing machinery of the eighteenth amendment and fell with it"; and that even if the section could be construed as imposing an excise tax, it was gravely doubtful whether it would be valid, since applicable to some States and portions of States and not to others, it was wanting in that geographical uniformity essential to the valid exercise by Congress of the taxing power (R. 22–25). Thereafter a petition for rehearing by the United States was denied (R. 26–27), and on June 3, 1935, this Court granted a petition by the Government for a writ of certiorari (R. 27).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that Section 701 "imposed a penalty as part of the enforcing machinery of the eighteenth amendment, and fell with it."

2. In holding in effect that Section 701 imposes not an excise tax but a penalty dealing with a subject left or committed by the Constitution to the control of the States.

3. In holding that even if Section 701 be construed as imposing an excise tax, it would be invalid because "it is wanting in that geographical uniformity essential to the valid exercise by Congress of such taxing power."

4. In reversing the judgment of the District Court.

SUMMARY OF ARGUMENT

Section 701 of the Revenue Act of 1926 did not impose a penalty as a part of the enforcing machinery of the Eighteenth Amendment and therefore did not fall with the repeal of that Amendment. It had its origin in the Revenue Act of 1918, which was approved February 24, 1919. The House Committee Report on the Revenue Bill of 1918 shows that a provision for the tax was included in the Bill as early as September 3, 1918. The Eighteenth Amendment was not ratified until January 29, 1919, and did not become effective until January 29, 1920. The National Prohibition Act was not enacted until October 28, 1919, and likewise did not become effective until January 29, 1920. The legislative history of this section shows that it was enacted primarily as a revenue measure.

The provision was continued in substantially the same form in the Revenue Acts of 1921 and 1924, and was finally reenacted as Section 701 of the Revenue Act of 1926. While the tax imposed was converted into a penalty during the era of national prohibition because it was required to be

doubled under Section 35, Title II, of the National Prohibtion Act upon evidence of manufacture and sale contrary to Federal law, the elimination of the doubling feature by the repeal of the Eighteenth Amendment restored the tax to its true character as a tax. That Congress regarded the tax as surviving the repeal of the Eighteenth Amendment is evident by its express repeal thereof in the Revenue Act of 1935 as of July 1, 1935.

Section 701 imposes an excise tax. It does not infringe upon the reserved powers of the States. It was established in the *License Tax Cases,* 5 Wall. 462, that such a tax does not give a license to carry on business within a State but merely exempts the taxpayer from penalties under national law if he pays the tax. That case also established that Congress may tax that which the States forbid.

The *Child Labor Tax Case,* 259 U. S. 20, and *Hill* v. *Wallace,* 259 U. S. 44, are readily distinguishable. The Federal statutes there involved disclosed on their very face a purpose to regulate, under the guise of taxes, matters wholly within the control of the States. That, in addition to the primary purpose of raising revenue, the statute may have had the incidental object of aiding the dry States in the discouragement of liquor traffic within their borders is immaterial. In *United States* v. *Doremus,* 249 U. S. 86, 93, this Court said that "If the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invali-

dated because of the supposed motives which induced it."

Under repeated decisions of this Court the tax meets the uniformity requirement of the Constitution. An improper delegation of the Federal taxing power to the State legislatures does not result from the fact that liability for the tax is dependent upon State law.

ARGUMENT

I

SECTION 701 DID NOT IMPOSE "A PENALTY AS PART OF THE ENFORCING MACHINERY OF THE EIGHTEENTH AMENDMENT" AND THEREFORE DID NOT FALL WITH THE REPEAL OF THAT AMENDMENT

The legislative history of Section 701 completely refutes the position of the Circuit Court of Appeals that that section was enacted for the purpose of imposing a penalty as a part of the enforcing machinery of the Eighteenth Amendment and was not intended to be a taxing measure designed primarily for the purpose of raising revenue.

Section 701 had its genesis in the Revenue Act of 1918, c. 18, 40 Stat. 1057, which was approved February 24, 1919 (p. 1152). As there enacted, it was the same in substance and the only difference was the purely formal one that the provision imposing the tax was carried in one section (Subdivision 12 of Section 1001, 40 Stat. 1126, 1128), while the provision for a penalty or imprisonment for carrying on business without paying the tax was

carried as a separate section (Section 1005, 40 Stat. 1129, 1130).

The 1918 Revenue Bill was, of course, pending before Congress for a considerable period of time, and the House Report on the Bill, referred to below, which was submitted to the House on September 3, 1918, reveals that the tax in question was then included in the Bill. The Eighteenth Amendment to the Constitution was not proclaimed as ratified until January 29, 1919, and did not become effective until one year later (U. S. C. A., Amendment 18). The National Prohibition Act, c. 85, 41 Stat. 305, 307, was not enacted until October 28, 1919, and except as to the war-time prohibition and certain other provisions was not in force until the effective date of the Eighteenth Amendment (Section 21, Title III, p. 322). It should also be noted that as originally enacted the tax was made effective January 1, 1919, before the Eighteenth Amendment was even ratified, that it was included in a section which dealt with eleven other occupational taxes, and that it was provided in this section that "The taxes imposed by this section shall, in the case of persons upon whom a corresponding tax is imposed by section 407 of the Revenue Act of 1916, be in lieu of such tax." We think it is therefore clearly evident that Section 701 came into being entirely apart and distinct from any purpose on the part of Congress to aid in the enforcement of national prohibition.

That the primary purpose of Section 701 was the raising of revenue is also clearly revealed by the legislative history. In the House Report on the Revenue Bill of 1918, in which Section 701 had its genesis (H. Rep. 767, Vol. 1, 65th Cong., 2d Sess.; Congressional Document No. 7308), it is revealed on the very first page thereof that one of the principal objects of the bill was to aid in financing the war. The Committee on Ways and Means then stated (p. 35):

> After considering all the special tax sources suggested to your committee it has endeavored to select such special taxes as would yield considerable revenue and at the same time well distribute the burden of taxation and be capable of satisfactory administration by the Treasury Department. It is believed that the special taxes recommended in the proposed bill will yield about $165,000,000 annually.
>
> The following table shows the special taxes levied under existing law and the proposed bill:
>
> * * * * *

Without any comment other than this the tax was listed in the report with more than twenty others, including taxes upon pawnbrokers, circuses, bowling alleys, riding academies, shooting galleries, and the use of yachts. As stated, this report was submitted September 3, 1918. There is not the slightest reference in the report to any relation of the

tax to the Eighteenth Amendment, or, for that matter, to its aiding in the enforcement of the liquor prohibition laws in the then existing dry States.[3]

The businesses in question were an obvious source of revenue to finance the war. At the time the Revenue Act of 1918 was enacted the figures available indicate that there were 27 States which were wholly dry and 11 which were partially dry.[4]

In imposing higher taxes on the illicit dealer than the legitimate dealer (see Revised Statutes, Sec. 3244, p. 53, *infra*), Congress was, of course dealing with distinct classes of people. The greater profits accruing ordinarily to the illicit dealer and the greater difficulty and expense in collecting the taxes served to differentiate the illegal from the legal dealers in classifying them for tax purposes. Eleven other special occupational taxes were imposed by the section of the Revenue Act of 1918 in which the tax in question was included—brokers, pawnbrokers, ship brokers, customhouse brokers,

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[3] The same is true of the report of the Committee on Finance of the Senate (Senate Report No. 617, 65th Cong., 3d Sess., pp. 17–18).

[4] These figures were taken from a bulletin of the Post Office Department (Liquor Bulletin No. 2) issued on June 15, 1917, in connection with Section 5 of the Act of March 3, 1917, effective July 1, 1917 (39 Stat. 1069), which prohibited the carriage by mail of advertisements of intoxicating liquors into "any place or point in any State or Territory of the United States at which it is by the law in force in the State or Territory at that time unlawful to advertise or solicit orders for such liquor * * *."

proprietors of theatres, of circuses, of other public exhibitions, of bowling alleys, of shooting galleries, of riding academies, and persons operating automobiles for hire—and a similar process of differentiation was applied as to various of these businesses. Thus a broker who was a member of a stock exchange paid more than one who was not, and a theatre proprietor in a town of five thousand inhabitants or less was treated differently from one in a larger city, while Chautauquas were exempted entirely.

As originally enacted, therefore, there is nothing to indicate that Congress was concerned primarily with anything else than the raising of revenue. National prohibition, except as a temporary war-time expedient, had not yet come into being, and if the rendering of assistance to the dry States played any part in the enactment of the legislation, that part was only incidental to the main purpose of raising revenue.

Without change in substance, the provision in question was carried through reenactment into the Revenue Acts of 1921 (Subsection 12 of Section 1001; Section 1004, c. 136, 42 Stat. 227, 296, 298), and 1924 (Subsection 9 of Section 701; Section 704, c. 234, 43 Stat. 253, 327, 328), and finally into the Revenue Act of 1926 as Section 701. While it was not thereafter repeated in the Revenue Acts, it continued in effect until June 30, 1935, as of which date

it was repealed by the Revenue Act of August 30, 1935 (footnote 1, pp. 3–4, *supra*).[5]

Although thus carried into the prohibition era, there is not the slightest indication anywhere that, chameleonlike, the provision changed in its inherent purpose from being a revenue statute to an instrumentality for the enforcement of national prohibition. Examination of the committee reports on the Revenue Acts of 1921, 1924, and 1926, discloses nothing from which a change in the dominant purpose of the legislation can be deduced.[6]

While the original taxes were reduced from twelve items in the Revenue Acts of 1918 and 1921 to nine items in the Revenue Act of 1924, the proprietors of theatres, circuses, and other public exhibitions being eliminated, and while all of these occupational taxes except that upon the illicit liquor dealer were omitted in Section 701 of the Revenue

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[5] The provision was carried as unrepealed in both the official and annotated editions of the United States Code which were in effect prior to the Revenue Act of 1935 (U. S. C. Sup. VII, Title 26, Secs. 1395, 1397 (a) (2), and U. S. C. A., Title 26, Sections 206, 192).

[6] Revenue Act of 1921, House Report No. 350, 67th Cong., 1st Sess., p. 15; Senate Report No. 275, 67th Cong., 1st Sess., p. 30; Revenue Act of 1924, House Report No. 179, 68th Cong., 1st Sess., p. 10; Senate Report No. 398, 68th Cong., 1st Sess., p. 10; Revenue Act of 1926, House Report No. 1, 69th Cong., 1st Sess., p. 16; Senate Report No. 52, 69th Cong., 1st Sess., p. 12.

Act of 1926, the committee reports disclose that this gradual elimination of the occupational taxes was occasioned by a mounting surplus in the Treasury which permitted a general reduction of taxes (House Report No. 179, 68th Cong., 1st Sess., p. 1, on the Revenue Bill of 1924), and also because, as stated by the House Committee on Ways and Means in its report on the Revenue Bill of 1926 (House Report No. 1, 69th Cong., 1st Sess., p. 16) "these taxes are not equitable in their application and produce but little revenue." While the inference would seem to be, therefore, that Congress in failing to repeal the tax in question regarded it as a revenue producer and as equitable in application, the important factor is, of course, that at no point in its legislative history did Congress deal with the tax in question as anything but a revenue measure or regard it primarily as an instrumentality for the suppression of the illicit liquor traffic.

In holding that Section 701 imposed a penalty in aid of the enforcement of national prohibition, and not a tax, the court below adverted to certain decisions of this Court relating to the effect of the National Prohibition Act and supplemental legislation upon the tax (R. 24, footnote 4). So far as these decisions have any pertinency they merely disclose that this and other internal revenue taxes which were imposed at the time of the enactment of the National Prohibition Act became penalties

when doubled under Section 35, Title II, of the National Prohibition Act.[1]

The basis of these decisions is that the tax was converted into a penalty when thus imposed because its purpose was to provide a punishment for something which had been made illegal under Federal law; i. e., the manufacture and sale of intoxicating liquor for beverage purposes. As was said in *Lipke* v. *Lederer*, 259 U. S. 557, 562, and reiterated in *United States* v. *La Franca*, 282 U. S. 568, 572, "Evidence of crime (§ 29) is essential to assessment under § 35. It (the imposition) lacks all the ordinary characteristics of a tax, whose primary function 'is to provide for the support of the government' and clearly involves the idea of punishment for infraction of the law—the definite function of a penalty." See also *Regal Drug Co.* v. *Wardell*, 260 U. S. 386. None of these decisions can be said to have held that the basic occupational tax imposed by Section 701, when separated from the excrescence engrafted upon it by Section 35, was

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[1] This section (c. 85, 41 Stat. 305, 317, U. S. C., Title 27, Sec. 52, provided that the National Prohibition Act—

> shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in [intoxicating] liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers.

anything other than what it purported to be, a tax. Indeed, in *United States* v. *One Ford Coupe*, 272 U. S. 321, a case involving the question whether an automobile seized by a prohibition agent could be forfeited under Section 3450 R. S., where used for the purpose of depositing or concealing tax-unpaid illicit liquors with intent to defraud the United States of the tax imposed thereon, this Court expressly held that the basic tax imposed on distilled spirits did not cease to be a tax and become a penalty by reason of the enactment of the Prohibition Act. In so holding the Court used language particularly persuasive in the instant case. It said (pp. 328–329):

> The claimant contends that the so-called tax on illicitly distilled spirits theretofore imposed ceased to be a tax and became in law a penalty, when the enactment of the National Prohibition Act changed the purpose of the tax from raising revenue to preventing manufacture, sale, and transportation; and that to enforce such penalty by forfeiture of the property rights of innocent third parties would be a denial of due process of law. It is true that the use of the word "tax" in imposing a financial burden does not prove conclusively that the burden imposed is a tax; and that when it appears from its very nature that the imposition prescribed is a penalty solely, it must be treated in law as such. But the imposition here in question is not of that character. A tax on intoxicating liquor does not cease

to be such because the sovereign has declared that none shall be manufactured, and because the main purpose in retaining the tax is to make law-breaking less profitable. What was sought to be enforced and held to be a penalty in *Lipke* v. *Lederer,* 259 U. S. 557, 561, was the so-called double tax. Here, we are dealing with the basic production tax.

With respect to the character of the impositions called taxes there is nothing in either the Revenue Acts or the Prohibition Act which makes any distinction between the product of legal and illegal distillation. The Acts left in effect the basic tax of $2.20 per gallon, which was and is a true tax on the product, whether legally or illegally distilled, and added to it the additional amounts in case of illegal distillation or diversion to illegal uses. These additional amounts also are called taxes by Congress, and were understood by it to be such. Whether they were intrinsically penalties and should be treated as such we need not determine. The basic tax of $2.20 a gallon on liquor illegally produced is not imposed because of illegality, but despite of it. It is a tax within the meaning of § 3450; and being unpaid makes that section applicable, even if the additional amounts imposed by the Acts be deemed penalties. * * *

See *Various Items* v. *United States,* 282 U. S. 577, 579.

The basic taxes did not change in their nature as taxes merely because Congress had made unlaw-

ful the manufacture and sale of intoxicating liquors for beverage purposes. As was said in *United States* v. *Stafoff*, 260 U. S. 477, 480, "Of course Congress may tax what it also forbids." See also *Ford Coupe* case, pp. 326–327.

Furthermore, in the *La Franca* case, *supra*, while it was held the tax imposed by Section 701 of the Revenue Act of 1924 (the predecessor of the section in question) became a penalty when doubled under Section 35 of the National Prohibition Act, the Court specifically recognized, in considering the effect of Section 5 of the Willis-Campbell Act,[a] that the tax must be considered as having been levied by a law in force prior to the National Prohibition Act, because the statute imposing it was passed in lieu of a similar provision in the Revenue Act of 1918, which was repeated in the Revenue Act of 1921 (pp. 571–572).

While Section 35, the Court said (pp. 575–576) must be considered as having amended the earlier

[a] This section saved all prior Internal Revenue laws which were not directly in conflict with the National Prohibition Act, and provided that if any act was a violation of any such laws and also of the National Prohibition Act a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. The question involved in the *La Franca* case was whether a conviction under the National Prohibition Act for unlawful sales of intoxicating liquor barred a later suit with respect to the same transactions for the taxes imposed upon retail liquor dealers by Revised Statutes, Section 3244, and Section 701 of the Revenue Act of 1924, as doubled by Section 35 of Title II of the National Prohibition Act.

legislation providing for the tax and that, as thus amended, the legislation was to be read, as to all subsequent occurrences, as if it had originally been in the amended form, it is obvious that the Court was there referring only to occurrences which took place subsequent to the passage of Section 35 of the National Prohibition Act. Before that Act was passed the tax was, we submit, a true tax unencumbered by any such penalizing feature as was superimposed by the National Prohibition Act. When that feature was eliminated through the repeal of the Eighteenth Amendment by the Twenty-first Amendment on December 5, 1933 (U. S. C. A. Cumulative Annual Pocket Part for Constitution, 1934, Pt. 3, p. 108), the tax reverted to its true status as a tax. The carrying on of the business of a retail malt liquor dealer contrary to State and municipal law which was made the basis of the charge contained in the information herein, was not alleged to have taken place until October 8, 1934 (R. 1), almost a year after the National Prohibition Act became inoperative.

Considerable stress is placed by the Circuit Court of Appeals upon the administrative practice and rulings in connection with the tax. That court pointed out (R. 22–23) that when the respondent paid the $25 tax on retail liquor dealers imposed by Section 3244 of the Revised Statutes (*infra*, p. 53), no other tax was demanded of him, and he was not requested to pay the special excise tax of $1,000 imposed by Section 701 of the Revenue Act

of 1926, for the failure to pay which he was prosecuted, and stated that:

> He supposed, and with reason, that he was fully paying all the taxes the Government would require of him, for at that time what is now claimed to be a tax, was by the Treasury ruling and by Department regulations and practices, declared and recognized not to be a tax, but a penalty. The district judge found the facts of departmental and administrative acts and rulings to be as set out in note 1, but he thought them immaterial. He thought the intention and effect of the statute to impose a tax plain on its face; that the tax was valid, and that the defendant, having failed to pay it, was subject to be prosecuted and convicted under it. We do not find the statutory intent and effect so plain as that its history and administrative interpretation may not be looked to for the light they throw. * * *

The facts of departmental and administrative acts and rulings to which the court alluded were set forth in the second, third, and fourth paragraphs of the stipulation of facts signed by counsel for both parties and filed in the District Court (R. 8–9). They have been summarized at pages 6–7, *supra*. In rejecting all of the facts recited as irrelevant to the issues presented, we think the District Court acted properly.

The fact that no special excise-tax stamps were available to the Collector until after the date it was charged the respondent carried on business without paying the tax is clearly immaterial. In a circular

issued in September 1934 (Exhibit C to stipulation, R. 8–9, copied at p. 7, *supra*), over a month prior to the date referred to, the Commissioner had instructed the Collector of Internal Revenue for the respondent's district that "Prior to the receipt of the $1,000 special excise tax stamps, collectors of internal revenue may accept payment of the tax and issue the stamps at a later date", and that the Collector should meanwhile issue a receipt for the tax. Obstacles to the payment of a tax do not, of course, relieve from liability for the tax, nor do they, as was said by this Court in the *Ford Coupe* case with reference to a somewhat similar situation (p. 327), "establish that the intention was not to continue it [the tax] in force."

The fact that the Collector did not advise the respondent of the special excise tax at the time he paid the ordinary occupational tax imposed on a retail liquor dealer by Section 3244 of the Revised Statutes (*infra,* pp. 52–53) is of no materiality. Section 53 of the Act of October 1, 1890 (*infra,* p. 50) specifically provided that special taxes shall become due on the first day of July of each year "or on commencing any trade or business on which such tax is imposed." Section 3232 of the Revised Statutes (*infra,* p. 50) contemplates that a special tax shall be paid before the commencement of the business upon which it is imposed. If, as we submit, the special excise tax had not been repealed, the Government was not, of course, estopped by any failure of the Collector to advise

the respondent that such a tax was due. *Utah* v. *United States*, 284 U. S. 534, 545–546. While the administrative provisions with reference to special taxes (*infra*, pp. 50–52) do not appear to contemplate the making of a demand by the Collector for the tax, the stipulation of facts discloses that a demand was made by the Collector for the special excise tax involved in the instant case about a week before the violation complained of in the information (R. 9).

Undue reliance was placed by the court below upon the administrative rulings to which it referred. Treasury Decision No. 3911, set out at R. 10–11 and referred to in footnote 1 of the opinion below, did, it is true, characterize the special excise tax of $1,000 imposed on anyone carrying on the business of a retail dealer in malt liquors contrary to the laws of a State or Territory as a penalty, and thus not collectible in the summary manner obtaining in the case of taxes, while at the same time it classified as taxes what might be termed the ordinary occupational taxes imposed on retail and wholesale dealers in malt liquors by Section 3244 of the Revised Statutes as amended (*infra*, p. 53). Why it did not refer to the other classes of business mentioned in these statutes is not apparent. In any event, it was approved on July 30, 1926, while Section 35 of Title II of the National Prohibition Act was in effect. As heretofore pointed out, the doubling of the occupational taxes

by Section 35 upon evidence of illegal manufacture and sale contrary to Federal law had converted these taxes into penalties and this Court had so decided in *Lipke* v. *Lederer*, 259 U. S. 557, *supra*, the opinion in which was rendered on June 5, 1922. (See also *Regal Drug Co.* v. *Wardell*, 260 U. S. 386, *supra*, decided December 11, 1922.)

It would appear, therefore, that when the Treasury Department was speaking of the special excise tax imposed under Section 701 as being a penalty it had in mind the change in the nature of the tax which had been effected by Section 35 of Title II of the National Prohibition Act. Of course, by a like token, it should also have referred to the ordinary occupational taxes imposed by Section 3244 of the Revised Statutes as penalties, for such they had become under Section 35 of the National Prohibition Act where there was evidence of illegal manufacture or sale requiring their doubling. A possible explanation of this, however, is that the Treasury Department would not, as a matter of policy, issue a permit to manufacture or sell intoxicating liquor even for purposes permitted by the National Prohibition Act where such activities constituted a violation of State law (see Sections 6 and 9, Title II, National Prohibition Act, 41 Stat. 310, 312), with the result that it was safe to classify the special excise tax under Section 701 as a penalty for all practical purposes even though the carrying on of the particular business might not be violative of Federal law, whereas the ordinary occupational taxes imposed under Section 3244 of the

Revised Statutes would, in many instances, involve business the carrying on of which would not be contrary to either the National Prohibition Act or State laws and for which permits could be issued, such as the manufacture and sale of liquor for medicinal purposes, etc., a consideration which would have made it inadvisable to classify unconditionally these taxes as penalties.

The difficulty, of course, with the Treasury Decision is that it was not sufficiently comprehensive to paint the full picture, but the fact remains that the circular was speaking of the situation as it obtained with respect to these various taxes—inaccurately in part, it is true—when they were considered in the light of Section 35, Title II, of the National Prohibition Act.

The first ruling of the Treasury Department which may be considered as an announcement that Section 701 imposed a penalty which would not continue with the repeal of national prohibition is contained in a Mimeograph issued by the Commissioner of Internal Revenue to the Collectors of Internal Revenue and others concerned on October 4, 1933, about two months before the repeal of the Eighteenth Amendment (Mim. 4077, Treasury Department Cumulative Bulletins Vol. XII–2, p. 500; referred to in footnote 1 of the opinion below). In this Mimeograph the Commissioner listed along with certain taxes on distilled spirits, wines, and fermented liquors "the special taxes imposed upon the several occupations related thereto, which are at present in effect and which will continue if and

when the eighteenth amendment is repealed," but did not include the special excise tax imposed by Section 701.

It is possible that the failure to enumerate this tax as continuing after the repeal of national prohibition was due to a misinterpretation of the decision of this Court in the *La Franca* case, *supra*, decided February 24, 1931, which, however, merely held that the tax imposed by Section 701 was a penalty when doubled under Section 35, Title II, of the National Prohibition Act upon evidence of illegal manufacture and sale under Federal law. But, however that may be, the ruling was, we submit, obviously wrong for the reasons heretofore stated, and this fact was recognized by the Treasury Department less than a year later when the Commissioner of Internal Revenue, in September 1934, issued to the Collectors of Internal Revenue instructions which placed the tax in its right category as a true tax and not a penalty which fell with the repeal of the Eighteenth Amendment (Exhibit C to stipulation of facts, R. 8–9, 11).*

* These instructions were preceded by a special circular, No. 16, dated July 18, 1934, which was issued by the Alcohol Tax Unit of the Bureau of Internal Revenue to District Supervisors and others concerned. This circular, which does not appear in the record, in referring to the procedure to be used by the Alcohol Tax Unit after August 1, 1934, for the determination and assessment of taxes in what were termed violation cases made specific mention of the special excise tax imposed by Section 701 of the Revenue Act of 1926 as a tax to be prorated, beginning with the month in which business is commenced, to the end of the fiscal year. On October 12, 1934, the Commissioner of Internal Revenue issued a Mimeograph (not appearing in the record) to Collectors of

It is evident that not only has there been no settled administrative construction of the statute contrary to the position of the Government but that the latest pronouncement of the Treasury Department is strictly in accord with that position. No administrative interpretation of the statute can, of course, convert into a penalty that which Congress intended to be a tax. Cf. *United States* v. *Morehead*, 243 U. S. 607, 613–614; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 492–493.

Reference is also made by the court below, apparently in connection with the point under discussion, to the Beer Act of March 22, 1933, c. 4, 48 Stat. 16. Just what bearing this Act has on the question presented it is difficult to see. Briefly, this Act, which was passed during national prohibition, defined as nonintoxicating within the meaning of the National Prohibition Act beer, ale, porter, wine, similar fermented malt or vinous liquor, and fruit juices when containing not more than 3.2% of alcohol by weight, imposed a tax on such liquor when containing over ½ of 1% or more of alcohol by volume at the rate of $5.00 per barrel, instead of at $6.00 as formerly (Section 608 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1109), authorized the manufacture of such liquor for sale under permit, and penalized manufacture without permit.

Internal Revenue and others giving detailed instructions with reference to the collection of the special excise tax under Section 701.

Section 4 (a), however, specifically provided that "No permit shall be issued under this section for the manufacture of fermented malt or vinous liquor or fruit juice in any State, Territory, or the District of Columbia, or political subdivision of any State or Territory, if such manufacture is prohibited by the law thereof," and it was also provided in Section 1 (c) that "Nothing in this Act shall be construed as repealing any special tax or administrative provision of the internal revenue laws applicable in respect of any of the following containing one-half of 1 per centum or more of alcohol by volume and not more than 3.2 per centum of alcohol by weight: Beer, ale, porter, wine, similar fermented malt or vinous liquor, or fruit juice." In the stipulation of facts in the instant case it was agreed that the respondent engaged in the business of a retail dealer in malt liquors containing more than ½ of 1% of alcohol and that this constituted a violation of the laws of Alabama and the City of Birmingham (R. 7–8). It is, we think, obvious that the Beer Act has no bearing upon the present litigation.[10]

[10] After the repeal of national prohibition the tax imposed on all beer was fixed at $5.00 a barrel by Section 9 (a) of the Liquor Taxing Act of 1934, c. 1, 48 Stat. 313, 314. The Beer Act was later repealed by Section 202 (a) of the Liquor Law Repeal and Enforcement Act of August 27, 1935 (Pub., No. 347, 74th Cong.). Neither of these Acts has any possible bearing on the question presented.

The court below also found comfort in the fact that Section 701 was not reenacted after the repeal of the Eighteenth Amendment. The reason for this is apparent. As we have heretofore pointed out, the tax imposed by Section 701 was originally in a section containing 12 special occupational taxes. An increasing surplus in the Treasury permitted the reduction of taxes. The section was accordingly amended through reenactment in 1924 so as to include only 9 items and in 1926 all of these taxes were eliminated except the one in question. As Congress evidently desired at the time to retain the tax as a matter of permanent policy, there was, of course, no necessity for further reenactment. But more significant even is the fact that Congress has itself recognized that Section 701 survived the repeal of national prohibition by expressly repealing it in the Revenue Act of 1935 as of July 1, 1935 (see footnote 1, pp. 3–4, *supra*).

A further reason given by the court below for holding that the tax was a penalizing adjunct of the Eighteenth Amendment was that Section 701 required "all kinds of handlers of intoxicating liquors to pay the same amount, instead of, as liquor-taxing acts do, making the exaction fit the business done" (R. 23). Along the same line, the court also said that "Its lumping under one head, and subjecting to one tax all persons engaged in any branch of the liquor business, instead of classifying them and taxing each in accordance with the business he

engages in, as revenue acts commonly do, is highly significant that the act was intended to be, and was a penalty measure" (R. 25). It is obvious that all who handled intoxicating liquor contrary to State laws were in the same boat. There was no logical reason for discrimination between the various kinds of businesses by which the traffic might be engaged in. Nor is it always true that liquor occupational taxes are graded in accordance with the amount of business done. A glance at Section 3244 of the Revised Statutes (*infra*, p. 53), under which occupational taxes have been imposed upon the handlers of intoxicating liquor and the makers of liquor equipment for many years, will show that the general practice is to impose a flat rate regardless of the extent of the business. Thus, a retail dealer in malt liquors pays $20 a year regardless of the extent of his sales.

We have heretofore attempted to show that Section 701 was not enacted as a part of the enforcing machinery of the Eighteenth Amendment and that it was primarily a revenue measure. Of course, the mere fact that it incidentally may have been utilized at one stage of its career to assist in the enforcement of national prohibition, would not change its essential character as a taxing measure. It is too well settled to require argument that a tax does not cease to be a tax merely because Congress may also have had some social or moral object in

view. As was said by this Court in *United States* v. *Yuginovich*, 256 U. S. 450, 462—

> That Congress may under the broad authority of the taxing power tax intoxicating liquors notwithstanding their production is prohibited and punished, we have no question. The fact that the statute in this aspect had a moral end in view as well as the raising of revenue, presents no valid constitutional objection to its enactment. *License Tax Cases*, 5 Wall. 462, 471; *In re Kollock*, 165 U. S. 526, 536; *United States* v. *Jin Fuey Moy*, 241 U. S. 394; *United States* v. *Doremus*, 249 U. S. 86. * * *

See also *United States* v. *One Ford Coupe*, 272 U. S. 321, 326, *supra*; *United States* v. *Sullivan*, 274 U. S. 259, 263.

II

SECTION 701 IMPOSES AN EXCISE TAX AND DOES NOT INFRINGE UPON THE RESERVED POWERS OF THE STATES

By its holding that Section 701 needed the support of the Eighteenth Amendment and that it consequently fell with the repeal of that amendment and its citation of the decisions of this Court in the *Child Labor Tax Case* (*Bailey* v. *Drexel Furniture Co.*), 259 U. S. 20, and *Hill* v. *Wallace*, 259 U. S. 44, the court below indicates that it was its view that the tax in some way infringed upon the powers reserved to the States by the Tenth Amendment. This is also the basis of the decision of the Circuit Court of Appeals for the Tenth Circuit in

Kesterson v. *United States,* 76 F. (2d) 913, holding the tax to be a penalty, which case is now pending before this Court on a petition for a writ of certiorari filed by the United States (No. 46, present term).

This question was, we submit, settled contrary to the view of the court below as long ago as 1866 by the decision of this Court in the *License Tax Cases,* 5 Wall. 462. By the Internal Revenue Act of 1864 Congress provided that no persons should be engaged in certain trades or businesses, including those of selling lottery tickets and retail dealing in liquors, until they should have obtained a "license" from the United States. By an amendatory Act of 1866 the words "special tax" were substituted in the place of the word "license" in the former Act. One conducting any business for which a "license" was necessary, or on which the "special tax" was imposed, without having obtained the former or paid the latter, was made liable under the Acts both to the tax and to fine or imprisonment, or both. The Acts provided, however, that no license so granted or special tax so laid should be construed to authorize any business within a State prohibited by the laws thereof, or so as to prevent the taxation by the State of the same business. The general question presented in the cases was whether the defendants in error could be lawfully convicted upon indictments charging them with having engaged in the businesses specified without having paid for the required "license" to carry on the business, or with-

out having paid the special tax, notwithstanding the businesses were wholly prohibited by the laws of the States in which they were conducted.

After holding that it was not concerned with the expediency or inexpediency of such legislation and that questions of policy are for the legislature, the Court addressed itself to the argument of the defendants in error that (p. 470)—

> a license to carry on a particular business gives an authority to carry it on; that the dealings in controversy were parcel of the internal trade of the State in which the defendants resided; that the internal trade of a State is not subject, in any respect, to legislation by Congress, and can neither be licensed nor prohibited by its authority; that licenses for such trade, granted under acts of Congress, must therefore be absolutely null and void; and, consequently, that penalties for carrying on such trade without such license could not be constitutionally imposed.

After pointing out that Congress has no power of regulation or any direct control over the internal commerce or domestic trade of the States, that Congress cannot authorize a trade or business within a State in order to tax it, and that "If, therefore, the licenses under consideration must be regarded as giving authority to carry on the branches of business which they license, it might be difficult, if not impossible, to reconcile the granting of them with the Constitution," the Court said (pp. 471–472):

But it is not necessary to regard these laws as giving such authority. So far as they relate to trade within State limits, they give none, and can give none. They simply express the purpose of the government not to interfere by penal proceedings with the trade nominally licensed, if the required taxes are paid. The power to tax is not questioned, nor the power to impose penalties for non-payment of taxes. The granting of a license, therefore, must be regarded as nothing more than a mere form of imposing a tax, and of implying nothing except that the licensee shall be subject to no penalties under national law, if he pays it.

This construction is warranted by the practice of the government from its organization. As early as 1794 retail dealers in wines or in foreign distilled liquors were required to obtain and pay for licenses, and renew them annually, and penalties were imposed for carrying on the business without compliance with the law. In 1802 these license-taxes and the other excise or internal taxes, which had been imposed under the exigencies of the time, being no longer needed, were abolished. In 1813 revenue from excise was again required, and laws were enacted for the licensing of retail dealers in foreign merchandise, as well as to retail dealers in wines and various descriptions of liquors. These taxes also were abolished after the necessity for them had passed away, in 1817. No claim was ever made that the licenses thus required gave author-

ity to exercise trade or carry on business within a State. They were regarded merely as a convenient mode of imposing taxes on several descriptions of business, and of ascertaining the parties from whom such taxes were to be collected.

With this course of legislation in view, we cannot say that there is anything contrary to the Constitution in these provisions of the recent or existing internal revenue acts relating to licenses.

The Court then said concerning the objection that the dealings for which licenses were required could not be taxed by the National Government because prohibited by State law (pp. 472–473):

Nor are we able to perceive the force of the other objection made in argument, that the dealings for which licenses are required being prohibited by the laws of the State, cannot be taxed by the National government. There would be great force in it if the licenses were regarded as giving authority, for then there would be a direct conflict between National and State legislation on a subject which the Constitution places under the exclusive control of the States.

But, as we have already said, these licenses give no authority. They are mere receipts for taxes. And this would be true had the internal revenue act of 1864, like those of 1794 and 1813, been silent on this head. But it was not silent. It expressly provided, in section sixty-seven, that no license provided for in it should, if granted, be construed to

> authorize any business within any State or Territory prohibited by the laws thereof, or so as to prevent the taxation of the same business by the State. This provision not only recognizes the full control by the States of business carried on within their limits, but extends the same principle, so far as such business licensed by the National government is concerned, to the Territories.
>
> There is nothing hostile or contradictory, therefore, in the acts of Congress to the legislation of the States. What the latter prohibits, the former, if the business is found existing notwithstanding the prohibition, discourages by taxation. The two lines of legislation proceed in the same direction, and tend to the same result. It would be a judicial anomaly, as singular as indefensible, if we should hold a violation of the laws of the State to be a justification for the violation of the laws of the Union.

And, finally, in speaking of the effect of the amendatory Act of 1866 in which the term "special tax" was substituted for the word "license", the Court said (pp. 473–474):

> Congress, in framing the act of 1866, has carefully guarded against any misconstruction of the legislative intention by substituting throughout the term "special tax" for the word "license." This judicious legislation has removed all future possibility of the error which has been common among persons engaged in particular branches of business, that they derived from the licenses

they obtained under the internal revenue laws, an authority for carrying on the licensed business independently of State regulation and control. And it throws, moreover, upon the previous legislation all the light of a declaratory enactment. It fully confirms, if confirmation were needed, the view we have already expressed, that the requirement of payment for licenses under former laws was a mere form of special taxation.

The act of 1866 contains the same provision in respect to the effect of special taxes which the original act of 1864 contained in respect to licenses. It provides expressly that the payment of the taxes imposed by it shall not exempt any person carrying on a trade or business from any penalty or punishment provided by State laws for carrying on such trade or business, or authorize the commencement or continuance of any such trade or business contrary to State laws, or prevent the imposition of any duty or any tax on such trade or business by State authority.

That the legislation in this case was framed in the light of the decision of this Court in the *License Tax Cases* would seem apparent. In the Revenue Act of 1866 the imposition was denominated as a "special tax". In Section 701 of the Revenue Act of 1926, it is termed "a special excise tax." Under both Acts a person engaging in any business on which the special tax was imposed without having paid the same was made liable both to the tax and

to fine or imprisonment, or both. Section 701 does not authorize the carrying on of business within a State for the purpose of taxing it. In fact, like the earlier legislation, it specifically provided that payment of the tax should not exempt any person from any penalty or punishment provided for by State law for carrying on the business specified, or authorize the commencement or continuance of any such business contrary to State law. There is consequently, to paraphrase the language of this Court in the *License Tax Cases,* nothing hostile or contradictory in the legislation to that of the States. What the latter prohibits, the former, if the business is found existing notwithstanding the prohibition, discourages by taxation. The two lines of legislation proceed in the same direction and tend to the same result. The Federal tax comes into being only after the State has regulated the business by prohibiting it.

The tax imposed by Section 701 is readily distinguishable from those involved in the *Child Labor Tax Case,* 259 U. S. 20, *supra,* and in *Hill* v. *Wallace,* 259 U. S. 44, *supra.* In the *Child Labor Tax Case* the law declared unconstitutional imposed a tax of ten per cent in addition to all other taxes upon the net profits of any person employing children below certain specified ages in mines and factories, or employing in factories children between certain ages more than eight hours a day or more than six days a week. The Act relieved from lia-

bility to the tax anyone who employed a child below the specified age without knowledge of the child's age. It authorized inspection of the employer's factory, not only by the taxing officers of the Treasury, the Department normally charged with the collection of taxes, but also by the Secretary of Labor and his subordinates, whose normal function is, of course, the advancement and protection of the welfare of labor.

This Court held that while "Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous" and that "They do not lose their character as taxes because of the incidental motive", the Act in question, when considered in the light of its elaborate specifications indicating the purpose to regulate a matter of State concern and the heavy exaction which it provided for a departure from a detailed and specified course of conduct in business, showed on its very face that it imposed not a tax but a "penalty to coerce people of a State to act as Congress wishes them to act in respect of a matter completely the business of the State government under the Federal Constitution."

In *Hill* v. *Wallace, supra,* the Court held that the Future Trading Act was not a valid exercise of the taxing power of Congress because, like the Child Labor Tax Law, it showed on its face that

it was a detailed regulation of a concern or business wholly within the police power of the States, with a heavy exaction to promote the efficacy of such regulation. The Court said that "The act is in essence and on its face a complete regulation of boards of trade, with a penalty of 20 cents a bushel on all 'futures' to coerce boards of trade and their members into compliance. When this purpose is declared in the title to the bill, and is so clear from the effect of the provisions of the bill itself, it leaves no ground upon which the provisions we have been considering can be sustained as a valid exercise of the taxing power."

It cannot be said that the provision involved in this case shows on its face any detailed regulation of a matter wholly within the police powers of the States.

On its face the tax is an occupational tax and therefore an excise tax. Occupational taxes on liquor dealers have been levied by the Government almost from its beginning. See *License Tax Cases, supra,* p. 471. The legislative history of the provision in question shows that its primary purpose was the raising of revenue. It may be assumed that an incidental purpose was the aiding of the dry States in their attempt to suppress the liquor traffic within their borders. Indeed, the extent of the exaction was undoubtedly such as effectively to suppress the traffic in some places, at least so far as the smaller dealers were concerned. But this Court has never held that mere onerousness was

sufficient to destroy the validity of an otherwise proper tax. As was said by this Court in *United States* v. *Doremus*, 249 U. S. 86, 93–94, in which this Court held valid the Harrison Narcotic Drug Act by which Congress imposed a special tax on those manufacturing, importing, and dispensing narcotic drugs and undertook to regulate in minute detail the distribution thereof in this country:

> The only limitation upon the power of Congress to levy excise taxes of the character now under consideration is geographical uniformity throughout the United States. This court has often declared it cannot add others. Subject to such limitation Congress may select the subjects of taxation, and may exercise the power conferred at its discretion. *License Tax Cases*, 5 Wall. 462, 471. Of course Congress may not in the exercise of federal power exert authority wholly reserved to the States. Many decisions of this court have so declared. And from an early day the court has held that the fact that other motives may impel the exercise of federal taxing power does not authorize the courts to inquire into that subject. If the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it. *Veazie Bank* v. *Fenno*, 8 Wall. 533, 541, in which case this court sustained a tax on a state bank issue of circulating notes. *McCray* v. *United States*, 195 U. S. 27, where the power was thor-

oughly considered, and an act levying a special tax upon oleomargarine artificially colored was sustained. And see *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 147, 153, 156, and cases cited.

Nor is it sufficient to invalidate the taxing authority given to the Congress by the Constitution that the same business may be regulated by the police power of the State. *License Tax Cases*, 5 Wall., *supra*.

The act may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue. If the legislation is within the taxing authority of Congress—that is sufficient to sustain it. *In re Kollock*, 165 U. S. 526, 536.

The legislation under consideration was before us in a case concerning § 8 of the act, and in the course of the decision we said: "It may be assumed that the statute has a moral end as well as revenue in view, but we are of opinion that the District Court, in treating those ends as to be reached only through a revenue measure and within the limits of a revenue measure, was right." *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 402. * * * * * *

See also *Nigro* v. *United States*, 276 U. S. 332, 353–354.

Section 701 was primarily a revenue measure. Discouragement of a traffic forbidden by the States was only incidental. There was not involved any such patent attempt to regulate a matter within

the control of the States as rendered invalid the statutes considered in the *Child Labor Tax Case* and *Hill* v. *Wallace*.

III

THE TAX MEETS THE UNIFORMITY REQUIREMENT OF THE CONSTITUTION

The court below stated that it was impelled to the view that the imposition was a penalty and not a tax because "it is gravely doubtful whether, if the act be construed as imposing an excise tax, it would be valid, since applicable to some States and portions of States and not to others, it is wanting in that geographical uniformity essential to the valid exercise by Congress of such taxing power" (R. 24).

Repeated decisions of this Court disclose that this doubt of the court below is without basis.

It was pointed out in the *Doremus* case, *supra* (p. 93) that:

> The only limitation upon the power of Congress to levy excise taxes of the character now under consideration is geographical uniformity throughout the United States. This court has often declared it cannot add others. Subject to such limitation Congress may select the subjects of taxation, and may exercise the power conferred at its discretion.

See also *La Belle Iron Works* v. *United States*, 256 U. S. 377, 392.

Absence of the subject of the tax in particular States or localities or differences in State laws affecting the incidence of the tax do not destroy geographical uniformity. In the *Head Money Cases*, 112 U. S. 580, it was contended that a tax upon the owners of steam or sail vessels of "fifty cents for each and every passenger, not a citizen of the United States, who shall come by steam or sail vessel from a foreign port to any port within the United States," was not uniform throughout the United States, but this Court said (p. 594):

> The uniformity here prescribed has reference to the various localities in which the tax is intended to operate. "It shall be uniform throughout the United States." Is the tax on tobacco void, because in many of the States no tobacco is raised or manufactured? Is the tax on distilled spirits void, because a few States pay three-fourths of the revenue arising from it?
>
> The tax is uniform when it operates with the same force and effect in every place where the subject of it is found. The tax in this case, which, as far as it can be called a tax, is an excise duty on the business of bringing passengers from foreign countries into this, by ocean navigation, is uniform and operates precisely alike in every port of the United States where such passengers can be landed. * * *

And at page 595 the Court added that "perfect uniformity and perfect equality of taxation, in all the

aspects in which the human mind can view it, is a baseless dream, as this court has said more than once. *State Railroad Tax Cases*, 92 U. S. 575, 612." See also *Knowlton* v. *Moore*, 178 U. S. 41, 106; *United States* v. *Singer*, 15 Wall. 111, 121.

In *Phillips* v. *Commissioner*, 283 U. S. 589, this Court said (p. 602):

> It is contended * * * that the tax liability of the transferee, as thus assessed and collected, violates the constitutional requirement of uniformity because differences in state laws may affect such liability. The extent and incidence of federal taxes not infrequently are affected by differences in state laws; but such variations do not infringe the constitutional prohibitions against delegation of the taxing power or the requirement of geographical uniformity.

See also *Poe* v. *Seaborn*, 282 U. S. 101, 117–118; *Florida* v. *Mellon*, 273 U. S. 12, 17.

In *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, it was contended that the Webb-Kenyon Act, which prohibited the transportation of liquors into dry States for personal use, was invalid because it did not operate uniformly, but this Court held (pp. 326–327):

> So far as uniformity is concerned, there is no question that the act uniformly applies to the conditions which call its provisions into play—that its provisions apply to all the States,—so that the question really is a complaint as to the want of uniform exist-

> ence of things to which the act applies and not to an absence of uniformity in the act itself. * * *.

If it be suggested that the tax is invalid because liability thereto is dependent upon State law and that there thus results an improper delegation of the Federal taxing power to the State legislatures, the answer is apparent not only from the quotation given from the decision of this Court in *Phillips v. Commissioner* (*supra*, p. 47) but also from the following quotation from this Court's opinion in the *Clark Distilling Co.* case (p. 326):

> The argument as to delegation to the States rests upon a mere misconception. It is true the regulation which the Webb-Kenyon Act contains permits state prohibitions to apply to movements of liquor from one State into another, but the will which causes the prohibitions to be applicable is that of Congress, since the application of state prohibitions would cease the instant the act of Congress ceased to apply. * * *

CONCLUSION

For the reasons stated, we respectfully submit that Section 701 of the Revenue Act of 1926 did not fall with the repeal of the Eighteenth Amendment; that it imposes an excise tax and does not infringe upon the reserved powers of the States; and that it meets the constitutional requirement of uniformity. The judgment of the Circuit Court of

Appeals should therefore be reversed and the judgment of the District Court affirmed.

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APPENDIX

Statutory provisions relating to special taxes:

Revised Statutes, Section 3232 (U. S. C., Title 26, Sec. 181):

> No person shall be engaged in or carry on any trade or business hereinafter mentioned until he has paid a special tax therefor in the manner hereinafter provided.

Revised Statutes, Section 3233 (U. S. C., Title 26, Sec. 182):

> Every person engaged in any trade or business on which a special tax is imposed by law shall register with the collector of the district his name or style, place of residence, trade or business, and the place where such trade or business is to be carried on. In case of a firm or company, the names of the several persons constituting the same, and their places of residence, shall be so registered.

Section 53, Act of October 1, 1890, c. 1244, 26 Stat. 567, 624 (U. S. C., Title 26, Sec. 186):

> That all special taxes shall become due on the first day of July, eighteen hundred and ninety-one, and on the first day of July in each year thereafter, or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for one year; and in the latter case it shall be reckoned proportionately, from

the first day of the month in which the liability to a special tax commenced to the first day of July following. * * * it shall be the duty of special tax payers to render their returns to the deputy collector at such times within the calendar month in which the special tax liability commenced as shall enable him to receive such returns, duly signed and verified, not later than the last day of the month, except in cases of sickness or absence as provided for in section three thousand one hundred and seventy-six of the Revised Statutes.

Revised Statutes, Section 3238 as amended (U. S. C., Title 26, Sec. 187):

All special taxes imposed by law, including the tax on stills or worms, shall be paid by stamps denoting the tax, and the Commissioner of Internal Revenue is required to procure appropriate stamps for the payment of such taxes; and the provisions of sections thirty-three hundred and twelve and thirty-four hundred and forty-six, and all other provisions of law relating to the preparation and issue of stamps for distilled spirits, fermented liquors, tobacco, and cigars, shall, so far as applicable, extend to and include such stamps for special taxes; and the Commissioner of Internal Revenue shall have authority to make all needful regulations relative thereto.

Revised Statutes, Section 3239 as amended (U. S. C., Title 26, Sec. 188):

Every person engaged in any business, avocation, or employment, who is thereby made liable to a special tax, except tobacco peddlers, shall place and keep conspicuously in his establishment or place of business all stamps denoting the payment of said special

tax; and any person who shall, through negligence, fail to so place and keep said stamps, shall be liable to a penalty equal to the special tax for which his business rendered him liable, and the costs of prosecution; but in no case shall said penalty be less than ten dollars. And where the failure to comply with the foregoing provision of law shall be through willful neglect or refusal, then the penalty shall be double the amount above prescribed: *Provided,* That nothing in this section shall in any way affect the liability of any person for exercising or carrying on any trade, business, or profession, or doing any act for the exercising, carrying on, or doing of which a special tax is imposed by law, without the payment thereof.

Revised Statutes, Section 3240 as amended (U. S. C., Title 26, Sec. 189):

Each collector of Internal revenue shall, under regulations of the Commissioner of Internal Revenue, place and keep conspicuously in his office, for public inspection, an alphabetical list of the names of all persons who shall have paid special taxes within his district, and shall state thereon the time, place, and business for which such special taxes have been paid, and upon application of any prosecuting officer of any State, county, or municipality he shall furnish a certified copy thereof, as a public record, for which a fee of $1 for each one hundred words or fraction thereof in the copy or copies so requested may be charged.

Special taxes on brewers, distillers, etc., other than those imposed by Section 701 of the Revenue Act of 1926:

Revised Statutes, Section 3244, as amended (U. S. C., Title 26, Secs. 202, 203, 205):

Special taxes are imposed as follows:

First. Brewers shall pay one hundred dollars * * *.

Second. Manufacturers of stills shall each pay fifty dollars, and twenty dollars for each still or worm for distilling made by him. * * *

* * * * *

Fourth. Retail dealers in liquors shall pay twenty-five dollars. * * *

Wholesale liquor-dealers shall pay one hundred dollars. * * *

Fifth. Retail dealers in malt liquors shall pay twenty dollars. * * *

Wholesale dealers in malt liquors shall pay fifty dollars. * * *

Revised Statutes, Section 3281 as amended (U. S. C., Title 26, Sec. 193, 306):

That any person who shall carry on the business of a rectifier, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquors, retail dealer in malt liquors, or manufacturer of stills, without having paid the special tax as required by law, or who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for every such offense, be fined not less than one hundred dollars nor more than five thousand dollars and imprisoned not less than thirty days nor more than two years. And all distilled spirits or wines, and all stills or other apparatus, fit or intended to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property

found in the distillery or rectifying establishment, or in any building, room, yard, or inclosure connected therewith, and used with or constituting a part of the premises; and all the right, title, and interest of such person in the lot or tract of land on which such distiller is situated, and all right, title, and interest therein of every person who knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same; and all personal property owned by or in possession of any person who has permitted or suffered any building, yard, or enclosure, or any part thereof, to be used for purposes of ingress or egress to or from such distillery which shall be found in any such building, yard, or enclosure, and all the right, title, and interest of every person in any premises used for ingress or egress to or from such distillery, who has knowingly suffered or permitted such premises to be used for such ingress or egress, shall be forfeited to the United States.

Revised Statutes, Section 3243 (U. S. C., Title 26, Sec. 201):

The payment of any tax imposed by the internal-revenue laws for carrying on any trade or business shall not be held to exempt any person from any penalty or punishment provided by the laws of any State for carrying on the same within such State, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such State or in places prohibited by municipal law; nor shall the payment of any such tax be held to prohibit any State from placing a duty or tax on the same trade or business, for State or other purposes.

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